

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

DAVID ROLAND NOLETTE,

Petitioner,

VS.

DON HELLING, *et al.*

Respondents.

3:07-cv-0022-KJD-RAM

ORDER

This action proceeds on a petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, by David Roland Nolette, a Nevada prisoner represented by counsel. Before the Court are respondents' motion to dismiss (Docket #7), petitioner's response in opposition (Docket #13), and respondents' reply (Docket #14).

I. Procedural History

On April 23, 2001, petitioner and co-defendant Scott Anthony Cannady were charged by information with the following: Count I, attempted murder; Count II, battery with a deadly weapon; Count III, robbery with the use of a deadly weapon; Count IV, battery with a deadly weapon, and Count V, conspiracy to commit robbery. (Exhibit 7).¹ Petitioner pled not guilty to the

¹ The exhibits referenced in this order are found in the Court's record at Docket #8-12.

1 charges. (Exhibit 9). On May 24, 2002, petitioner moved to change his plea. (Exhibit 24).
2 Petitioner pled guilty to Counts II, III, IV, and V of the information. (*Id.*). The court ordered the
3 matter to proceed to trial on Count I. (*Id.*).

4 On May 28, 2002, jury trial commenced for petitioner and his co-defendant. (Exhibit
5 25). On June 3, 2002, the jury found petitioner not guilty on Count I and guilty on Counts II, III, and
6 IV. (Exhibits 30 and 32). The court filed a judgment of acquittal as to Count I. (Exhibit 35).

7 On August 6, 2002, the court sentenced petitioner as follows: on Count II to 48-120
8 months; on Count III to 48-120 months to be served consecutive to Count II, with a like consecutive
9 term of 48-120 months for the use of a deadly weapon; on Count IV to 24-120 months to be served
10 consecutive to Count III; and on Count V to 12-72 months to be served concurrent to Count II, with
11 restitution in the amount of \$586,651.54. (Exhibit 40). The judgment of conviction was filed on
12 August 6, 2002. (*Id.*).

13 Petitioner did not file a direct appeal to the Nevada Supreme Court.

14 On August 4, 2003, petitioner, though counsel, filed a post-conviction habeas petition
15 in state district court. (Exhibit 43). On September 23, 2004, the court conducted an evidentiary
16 hearing on the petition. (Exhibit 56). The court allowed the parties to supplement the petition. (*Id.*).
17 Petitioner filed a supplemental brief in support of his petition. (Exhibit 57).

18 On December 9, 2004, the court informed the parties of its holding on the writ.
19 (Exhibit 61). On December 28, 2004, the court filed its written order denying the petition. (Exhibit
20 62). Petitioner appealed the denial of his state habeas petition. (Exhibit 64). Petitioner filed a fast-
21 track statement. (Exhibit 76). The Nevada Supreme Court ordered full briefing. (Exhibit 84). The
22 parties filed opening, answering, and reply briefs. (Exhibits 86, 87, 88).

23 On April 26, 2006, the Nevada Supreme Court affirmed the denial of Nolette's state
24 habeas petition. (Exhibit 91). Remittitur issued on May 23, 2006. (Exhibit 92). On January 11,
25 2007, petitioner, through counsel, filed a federal habeas petition in this Court. (Docket #1).

1 **II. Discussion**

2 In the motion to dismiss, respondents argue that the federal habeas petition is
3 untimely.² The Antiterrorism and Effective Death Penalty Act (AEDPA) amended the statutes
4 controlling federal habeas corpus practice to include a one-year statute of limitations on the filing of
5 federal habeas corpus petitions. With respect to the statute of limitations, the habeas corpus statute
6 provides:

7 (d)(1) A 1-year period of limitation shall apply to an application
8 for a writ of habeas corpus by a person in custody pursuant to the
9 judgment of a State court. The limitation period shall run from
10 the latest of—

11 (A) the date on which the judgment became final by the
12 conclusion of direct review or the expiration of the time
13 for seeking such review;

14 (B) the date on which the impediment to filing an
15 application created by State action in violation of the
16 Constitution or laws of the United States is removed, if the
17 applicant was prevented from filing by such State action;

18 (C) the date on which the constitutional right asserted was
19 initially recognized by the Supreme Court, if the right has
20 been newly recognized by the Supreme Court and made
21 retroactively applicable to cases on collateral review; or

22 (D) the date on which the factual predicate of the claim or
23 claims presented could have been discovered through the
24 exercise of due diligence.

25 (2) The time during which a properly filed application for State
26 post-conviction or other collateral review with respect to the
27 pertinent judgment or claim is pending shall not be counted
28 toward any period of limitations under this subsection.

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30 28 U.S.C. § 2244(d).

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32 ² The Court does not reach respondents' arguments that the claims in the petition are either
33 unexhausted or procedurally barred, as application of the AEDPA's statute of limitations disposes of this
34 action.

1 In the present case, petitioner's judgment of conviction was filed on August 6, 2002.
2 (Exhibit 40). Petitioner had thirty days to file a notice of appeal, pursuant to Nevada Rules of
3 Appellate Procedure 4(b). Petitioner did not file a notice of appeal. Petitioner's conviction became
4 final on September 6, 2002, thirty days after the filing of the judgment of conviction. The time
5 period from August 6, 2002, through September 6, 2002, is statutorily tolled. The AEDPA one-year
6 statute of limitations began to run on September 6, 2002. 28 U.S.C. § 2244(d)(1)(A).

7 Once the thirty days lapsed in which petitioner could file a direct appeal to the
8 Nevada Supreme Court on September 6, 2002, petitioner did nothing until he filed his state habeas
9 petition on August 4, 2003. (Exhibit 43). This elapsed time of 331 days was not tolled by statute
10 because petitioner had no post-conviction or other collateral review pending with the state courts. 28
11 U.S.C. § 2244(d)(1),(2).

12 During time period from August 4, 2003, when petitioner filed his state habeas
13 petition, through May 23, 2006, when the Nevada Supreme issued its remittitur from the denial of
14 petitioner's appeal on his state habeas petition, the statute of limitations was tolled. 28 U.S.C. §
15 2244(d)(2).

16 Petitioner filed his federal habeas petition on January 11, 2007. (Docket #1). From
17 May 23, 2006, the date of the Nevada Supreme Court's issuance of remittitur, to January 11, 2007,
18 the date on which petitioner filed his federal habeas petition, 232 days elapsed. The statute of
19 limitations was not tolled during this time period. 28 U.S.C. § 2244(d)(1),(2).

20 Adding together the two time periods during which the statute did not toll, a total of
21 563 days elapsed, making the federal habeas petition untimely by 198 days. 28 U.S.C. § 2244(d).

22 In his opposition, petitioner does not dispute the date that his conviction became final
23 and he does not challenge respondents' calculations of time periods. Petitioner argues that he is
24 entitled to statutory tolling during the 331 days between the time his conviction became final on
25 September 6, 2002, and the filing of his state habeas petition on August 4, 2003. Petitioner argues
26

1 that during this time period, his state action was “pending” within the meaning of 28 U.S.C. §
2 2244(d)(2). Petitioner’s understanding of the AEDPA statute of limitations is misguided. There was
3 no state habeas petition or collateral review proceeding “pending” after the time for petitioner to seek
4 direct review expired until he filed his state habeas petition, 331 days later. This 331 days is not
5 subject to tolling under the AEDPA. 28 U.S.C. § 2244(d). It is plain to this Court that petitioner’s
6 federal habeas petition was untimely filed.

7 Because the petition is untimely, this Court may only consider it if petitioner can
8 demonstrate that extraordinary circumstances beyond his control made it impossible to file the
9 petition on time. *See Beeler*, 128 F.3d at 1288. Generally, a litigant seeking equitable tolling bears
10 the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2)
11 that some extraordinary circumstance stood in his way.” *Pace v. DiGuglielmo*, 544 U.S. 408, 418
12 (2005). In the instant case, petitioner makes no argument that he is entitled to equitable tolling.
13 Because the federal habeas petition was untimely filed, and petitioner is not entitled to equitable
14 tolling, this action must be dismissed.

15 **III. Certificate of Appealability**

16 The Court has considered the issues raised by petitioner, with respect to whether they
17 satisfy the standard for issuance of a certificate of appealability. In order to proceed with an appeal,
18 petitioner must receive a certificate of appealability. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th
19 Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946, 950-951 (9th Cir. 2006); *see also United States v.*
20 *Mikels*, 236 F.3d 550, 551-52 (9th Cir. 2001). Generally, a petitioner must make “a substantial
21 showing of the denial of a constitutional right” to warrant a certificate of appealability. *Id.*; 28 U.S.C.
22 § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). “The petitioner must demonstrate
23 that reasonable jurists would find the district court’s assessment of the constitutional claims
24 debatable or wrong.” *Id.* (*quoting Slack*, 529 U.S. at 484). In order to meet this threshold inquiry,
25 the petitioner has the burden of demonstrating that the issues are debatable among jurists of reason;

1 that a court could resolve the issues differently; or that the questions are adequate to deserve
2 encouragement to proceed further. *Id.*

3 Where the court has dismissed a petitioner's habeas corpus petition on procedural
4 grounds, however, the determination whether a certificate of appealability ("COA") issue becomes a
5 two-part test. The Supreme Court has held that under such circumstances:

6 When the district court denies a habeas petition on procedural grounds
7 without reaching the prisoner's underlying constitutional claim, a COA
8 should issue when the prisoner shows, at least, that jurists of reason
9 would find it debatable whether the petition states a valid claim of the
denial of a constitutional right and that jurists of reason would find it
debatable whether the district court was correct in its procedural
ruling.

10 *Slack*, 529 U.S. at 484. Therefore, in order to obtain a COA in cases dismissed on procedural
11 grounds, petitioner has the burden of demonstrating both that he was denied a valid constitutional
12 right, *and* that jurists of reason would find it debatable whether the court's procedural ruling was
13 correct. In cases where there is a plain procedural bar to a petitioner's claims and the district court is
14 correct to invoke that procedural bar to dispose of the case, "a reasonable jurist could not conclude
15 either that the district court erred in dismissing the petition or that the petitioner should be allowed to
16 proceed further." *Id.* Under those circumstances "no appeal would be warranted." *Id.* Furthermore,
17 the court may resolve either issue first when the answer to one issue is more apparent from the record
18 and arguments. *Id.* at 485; *see Petrocelli v. Angelone*, 248 F.3d 877, 884 (9th Cir. 2001).

19 In the present case, petitioner's habeas petition is being dismissed because it was
20 untimely filed. The Court did not reach the merits of any of petitioner's constitutional claims
21 because those claims are barred by the AEDPA statute of limitations. Petitioner's habeas petition
22 was filed late and petitioner failed to demonstrate that he is entitled to equitable tolling of the statute
23 of limitations in this case. No reasonable jurist could conclude that this Court's procedural ruling
24 was in error. Petitioner is not entitled to proceed further, and is not entitled to a Certificate of
25 Appealability.

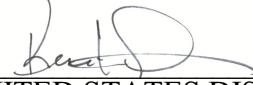
1 **IV. Conclusion**

2 **IT IS THEREFORE ORDERED** that respondents' motion to dismiss (Docket #7) is
3 **GRANTED.** The petition is **DISMISSED WITH PREJUDICE.**

4 **IT IS FURTHER ORDERED** that the Clerk of Court **SHALL ENTER**
5 **JUDGMENT** accordingly.

6 **IT IS FURTHER ORDERED** that petitioner is **DENIED** a certificate of
7 appealability.

8 DATED: August 19, 2008.

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12 UNITED STATES DISTRICT JUDGE

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